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| <b>Soldo v Musawir</b>                                                                                                                                                                                                         |
| 2023 NY Slip Op 31761(U)                                                                                                                                                                                                       |
| May 24, 2023                                                                                                                                                                                                                   |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: Index No. 158683/2020                                                                                                                                                                                           |
| Judge: James G. Clynnes                                                                                                                                                                                                        |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. JAMES G. CLYNES **PART** **22M**

*Justice*

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|             |                               |
|-------------|-------------------------------|
| TINA SOLDO, | INDEX NO. <u>158683/2020</u>  |
| Plaintiff,  | MOTION DATE <u>11/01/2022</u> |
| - v -       | MOTION SEQ. NO. <u>001</u>    |

MOHAMMED A. MUSAWIR, NEA EGNATIA TAXI INC.

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, the motion by Defendants pursuant to CPLR 3212 for summary judgment and to dismiss the Complaint of Plaintiff on the grounds that there are no triable issues of fact, in that the Plaintiff cannot meet the serious injury threshold requirements as mandated by Insurance Law Sections 5104(a) and 5102(d) is decided as follows:

Plaintiff seeks recovery for injuries allegedly sustained as a result of an October 17, 2019 motor vehicle accident between a vehicle owned by NEA EGNATIA Taxi, Inc. and operated by Defendant Mohammed A. Musawir, and Plaintiff, who was riding on her electric scooter. Plaintiff's Bill of Particulars alleges injuries to her right shoulder, for which she underwent arthroscopic surgery on December 8, 2020, cervical spine, lumbar spine, right knee, and right ankle that fall under the serious injury categories of Insurance Law 5102 (d).

The burden rests upon the movant to establish that the plaintiff has not sustained a serious injury (*Lowe v Bennett*, 122 AD2d 728 [1st Dept 1986]). When the movant has made such a showing, the burden shifts to the plaintiff to produce prima facie evidence to support the claim of serious injury (*see Lopez v Senatore*, 65 NY2d 1017 [1985]).

In support of their motion, Defendants rely on the affirmed independent orthopedic examination report of Dr. Pierce J. Ferriter and the affirmed independent radiological review report of Dr. Scott A. Springer, and Plaintiff's examination before trial (EBT) testimony.

Dr. Ferriter examined Plaintiff on October 8, 2021 and concluded that Plaintiff's cervical spine sprain/strain, thoracic spine sprain/strain, lumbar spine sprain/strain, pelvis sprain/strain, right knee sprain/strain, and right knee sprain/strain are all resolved, and her status post right shoulder surgery was healed. Dr. Ferriter measured Plaintiff's range of motion with a goniometer and compared the measurements to the normal active range of motion values according to AMA Guidelines and found normal range of motion and negative objective tests as to Plaintiff's cervical spine, thoracic spine, lumbar spine, right shoulder, right and left hip/pelvis, right knee, and right ankle. Dr. Ferriter reported that Plaintiff's examination indicated no findings which would result in orthopedic limitations in use of the subject body parts and that Plaintiff is capable of functional use of the subject body parts for normal activities of daily living. Dr. Ferriter concluded that there is no permanency or disability from the subject accident.

Dr. Springer undertook an independent radiological review of the MRIs taken of Plaintiff's cervical spine, taken on January 4, 2020, lumbar spine, taken on August 21, 2019 and again on January 2, 2020, and right shoulder, taken on January 4, 2020. As to Plaintiff's cervical spine, Dr. Springer found no evidence of fracture, subluxation or prevertebral soft tissue swelling. At C5-C6 and C6-C7, Dr. Springer reported mild disc bulges, disc desiccation, and disc space height loss, but noted that these have no traumatic basis and are degenerative in origin. The disc bulges are related to ligamentous laxity and weakening of the ligamentous fibers. Otherwise, Dr. Springer found no disc bulges.

As to Plaintiff's lumbar spine, Dr. Springer compared MRIs taken before and after the subject accident. Dr. Springer noted increased signal in the posterior midline of the disc which is compatible with a prior injury and predates the subject incident as it was seen in the MRI taken on August 21, 2019, prior to the subject accident. Present in both MRIs was also straightening of the normal lumbar lordosis, disc desiccation at L5-S1, disc space height loss at L5-S1, disc bulge at L4-L5, chronic disc herniation at L5-S1, neural foraminal narrowing at L5-S1, and facet hypertrophy at L5-S1. In neither MRI was any evidence of fracture or subluxation.

As to Plaintiff's right shoulder, Dr. Springer noted chronic fraying of the superior labrum, which he specified results from wear and tear and repetitive motion, and found no evidence of tears, fracture, dislocation, or soft tissue swelling. Dr. Springer noted a lateral downsloping

acromial process, which, he explained, is a developmental variant unrelated to trauma which caused mild mass effect on the rotator cuff interval but reported that the rotator cuff tendons are intact. Dr. Springer reported no fracture, dislocation, or acromioclavicular joint separation.

Defendants have met their initial burden of establishing that Plaintiff did not sustain serious injuries as a result of the accident under Insurance Law 5102 (d) (*Perez v Rodriguez*, 25 AD3d 506 [1st Dept 2006]). The burden therefore shifts to Plaintiff to produce prima facie evidence to support his claim of serious injury.

In opposition, Plaintiff relies on the affirmed MRI reports of Dr. David Milbauer, the affirmed medical records by Dr. Joyce Goldenberg of Central Park Physical Medicine and Rehabilitation, P.C., the certified physical therapy records from Central Park Physical Medicine & Rehab, P.C., the affirmed report of Dr. Thomas A. Scilaris of Park West Surgical LLC, and the medical records by Dr. Raz Winiarsky of Brooklyn Premier Orthopedic Center for Musculoskeletal Disorders.

As an initial matter, Defendants contend in reply that the affirmations and certifications attached to the reports submitted by Plaintiff in opposition to this motion are insufficient and the reports should therefore not be considered by this Court. However, it is well settled that Plaintiff's medical evidence in opposition to summary judgment must be presented by way of sworn affirmations or affidavits (*Zuckerman v New York*, 49 NY2d 557 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]; see also *Mitchell v NY City Hous. Auth.*, 204 AD2d 91 [1st Dept 1994]). A medical affirmation or affidavit that is based on a physician's personal examination and observation of plaintiff is an acceptable method to provide a physician's opinion regarding the existence and extent of a plaintiff's serious injury (*O'Sullivan v Atrium Bus Co.*, 246 AD2d 418 [1st Dept 1998]). Here, the affidavits and affirmations set forth that the doctor himself or herself was the individual who examined Plaintiff and the evaluations had an objective basis and compared Plaintiff's limitations to normal functions (*Toure v Avis Rent a Car Sys.*, 98 NY2d 345 [2002]).

Notwithstanding the Court's finding that the reports are properly before the Court, the Court finds that the record of Plaintiff's treatment with Dr. Winiarsky is without probative value as it fails to indicate how the doctor measured Plaintiff's range of motion and fails to provide a

baseline norm to compare the ranges, eroding the reliability of the assessments, “leaving the court to speculate” as to their ultimate meaning (*Bray v Rosas*, 29 AD3d 422 [1st Dept 2006]). Besides setting forth measurements for range of motion, a physician must identify the objective tests performed in ascertaining those measurements (*Taylor v Terrigno*, 27 AD3d 316 [1st Dept 2006]).

Dr. Milbauer read and interpreted the MRIs of Plaintiff’s cervical spine, lumbar spine, and right shoulder. Dr. Milbauer compared the lumbar spine MRI with a prior lumbar spine MRI from 2019 and found a midline posterior disc herniation abutting the S1 nerve roots within the lateral recesses bilaterally at the L5-S1 level, which has not significantly changed since the last MRI. Dr. Milbauer did report a posterior disc bulge at L4-L5 but noted no fractures or destructive osseous lesions. As to the MRI of Plaintiff’s cervical spine, Dr. Milbauer reported a midline posterior disc bulge at C5-C6, a minimal disc bulge at C6-C7, and a straightening of the cervical lordosis, which may be related to muscle spasm. As to the MRI of Plaintiff’s right shoulder, Dr. Milbauer reported a superior labral tear/SLAP lesion involving the posterosuperior labrum, inflammatory changes of the subacromial-subdeltoid bursa, laterally downsloping anterior acromion, and a lateral deltoid muscle tear or contusion.

Dr. Goldenberg first examined Plaintiff on December 17, 2019 and measured Plaintiff’s range of motion with a goniometer and inclinometer and compared it with normal range of motion pursuant to the American Academy of Orthopedic Surgeons’ Standard. As to Plaintiff’s cervical spine, lumbar spine, right shoulder, and right knee, Dr. Goldenberg reported limited range of motion. Dr. Goldenberg concluded that Plaintiff experienced a cervical sprain/whiplash, cervical myositis, lumbar sprain, internal derangement of the right shoulder, right knee, and right ankle. Dr. Goldenberg’s reports indicate that Plaintiff’s most recent examination was on July 23, 2020.

Plaintiff first was treated using physical therapy on December 23, 2019. Throughout her treatment, Plaintiff was diagnosed with a sprain of her lumbar spine and neck. Plaintiff’s most recent physical therapy session was on August 11, 2020.

Dr. Scilaris first examined Plaintiff on October 14, 2020 and performed a right shoulder arthroscopy on December 8, 2020. Dr. Scilaris measured Plaintiff’s range of motion using a goniometer with normal ranges of motion coming from the AMA 5<sup>th</sup> Edition and found limitation to Plaintiff’s right shoulder both before and after the arthroscopy, as well as limitation as to

Plaintiff's left shoulder and left knee ranges of motion. Dr. Scilaris concluded that Plaintiff's injuries were causally related to the subject accident, are permanent, and cannot be completely resolved by further medical intervention.

With regard to Plaintiff's cervical spine and lumbar spine, Plaintiff's opposition fails to address the degeneration cited by Defendants' medical expert. However, as Plaintiff has shown sufficient evidence of serious injury to her right shoulder to raise an issue of fact, it is not necessary to determine the adequacy of the evidence as to her cervical spine and lumbar spine injuries. She may be entitled to recover for all injuries causally related to the subject accident (*see Linton v Nawaz*, 14 NY3d 821 [2010]; *Rubin v SMS Taxi Corp.*, 71 AD3d 548 [1st Dept 2010]).

With respect to the 90/180 days category of serious injury, there is no competent medical evidence demonstrating that Plaintiff was unable to perform substantially all of her normal activities for at least 90 of the first 180 days as a result of the accident (*Elias v Mahlah*, 58 AD3d 434, 435 [1st Dept 2009]). Plaintiff's Bill of Particulars alleges that she was confined to her bed and home for two weeks. This defeats her claim under this category (*Frias v Son Tien Liu*, 107 AD3d 589, 590 [1st Dept 2013] ["Plaintiff's deposition testimony that he was confined to bed and home for about one week after the accident, and that his workday was shortened by an hour, defeats his 90/180 day claim"]). In her EBT, Plaintiff testified that she was working for Postmates delivering food a couple of days per week and stopped working because of the accident. Plaintiff also testified that she has a scar from the right shoulder surgery due to this accident, she cannot play sports, and that she has trouble pushing a shopping cart, reaching high places, and carrying things, such as her cat that weighs five pounds. She further testified that she was confined to her bed for about two weeks after the accident and confined to her home for a period of time but was not sure how long. She did not think any doctor told her to stay home or in bed immediately after the accident.

Plaintiff's subjective claims of pain and his unsubstantiated claim that she was unable to perform her customary daily activities during the relevant period following the accident are insufficient to raise a triable issue of fact (*Copeland v Kasalica*, 6 AD3d 253, 254 [1st Dept 2004]). Therefore, Defendants' motion for summary judgment is granted under the 90/180 category only. Accordingly, it is

**ORDERED** that the motion by Defendants for summary judgment and dismissal of Plaintiff's complaint is **DENIED** except as to Plaintiff's claim of serious injury under the 90/180-day category of Insurance Law 5102 (d); and it is further

**ORDERED** that any requested relief not specifically addressed herein has nonetheless been considered; and it is further

**ORDERED** that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon all Defendants with Notice of Entry.

This constitutes the Decision and Order of the Court.

|                       |                                                                  |                                                                                    |                                    |
|-----------------------|------------------------------------------------------------------|------------------------------------------------------------------------------------|------------------------------------|
| <u>5/24/2023</u>      |                                                                  |  |                                    |
| DATE                  |                                                                  | JAMES G. CLYNES, J.S.C.                                                            |                                    |
| CHECK ONE:            | <input type="checkbox"/> CASE DISPOSED                           | <input checked="" type="checkbox"/> NON-FINAL DISPOSITION                          |                                    |
|                       | <input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED | <input checked="" type="checkbox"/> GRANTED IN PART                                | <input type="checkbox"/> OTHER     |
| APPLICATION:          | <input type="checkbox"/> SETTLE ORDER                            | <input type="checkbox"/> SUBMIT ORDER                                              |                                    |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> INCLUDES TRANSFER/REASSIGN              | <input type="checkbox"/> FIDUCIARY APPOINTMENT                                     | <input type="checkbox"/> REFERENCE |